new ground for subrogation, *i. e.*, mistake. They presume that the mortgagee would not have so acted had he known the whole truth. That the same is the rule in England would appear from a case which held that a mortgagee did not lose his priority by reconveying and accepting other security which was a charge on the land.[11] That case was not called to the attention of the court in the principal case.

J. S. B.

PROPERTY—FIXTURES—AS BETWEEN TENANT AND MORTGAGEE—In *Equitable Guarantee & Trust Company* v. *Hukill*,[1] an injunction was asked by a mortgagee of land to restrain the removal of buildings erected by a tenant of the mortgagor. The tenant occupied the premises under a lease which expressly gave him authority to erect frame structures for the storage of lumber in the course of his business and to remove them during the term. The tenant being about to remove the buildings so erected, this suit was brought before the expiration of his term, and before a foreclosure of the mortgage. In dismissing the bill, the court held that under these circumstances, as it was not shown that the original security would be impaired, the tenant might remove the buildings as against the prior mortgagee of his landlord.

In spite of the old maxim, *quicquid planatur solo, solo cedit*, the exceptional right of the tenant to remove fixtures annexed for the purposes of trade has long been recognized,[2] and it may be stated generally that the tenant is permitted to remove chattels annexed to the realty of his landlord, which were so placed for purposes of trade, provided that such annexed articles are removable without material injury to the freehold.[3] As between mortgagor and mortgagee, however, the old, stricter rule has been applied, and a mortgagor may not remove fixtures which he has attached to the freehold subsequent to the mortgage, as against his mortgagee. That such fixtures have been attached for trade purposes seems to be immaterial.[4]

---

[11] Stevens v. Mid-Hants Ry. Co., L. R. 8 Ch. App. 1064 (1874).

[1] 85 Atl. Rep. 60 (Del., 1912).

[2] See Henry's case, Y. B. 20 Hen. VII, 13, pl. 24 (1505); Poole's Case, Salk. 368 (1703).

[3] Elwes v. Maw, Salk. 368 (1703); Whitehead v. Bennett, 27 L. J. Ch. 474 (1858); Doty v. Gorham, 5 Pick. 487 (Mass., 1827); Van Ness v. Packard, 2 Pet. 137 (1829); Holbrook v. Chamberlin, 116 Mass. 155 (1874); see also Collamore v. Gillis, 149 Mass. 578 (1889); Wiggins Perry Company v. O. and M. Railway, 142 U. S. 396 (1891); Ewell on Fixtures, Second Edition, pp. 121, 126; Amos & Ferrard on Fixtures, Third Edition, pp. 40 *et seq.*; 2 Tiffany, Landlord and Tenant, p. 1570; Bronson on Fixtures, Sect. 30.

[4] Walmsley v. Milne, 7 C. B. N. S. 115 (1859); Longbottom v. Berry, L. R. 5 Q. B. 123 (1869); Climie v. Wood, L. R. 4 Exch. 328 (1869); Holland v. Hodgson, L. R. 7 C. P. 328 (1872); Day v. Perkins, 2 Sandf. Ch. 359 (N. Y., 1845); Butler v. Page, 7 Met. 40 (Mass., 1843); Jones on Mortgages, Vol. I, Sect. 441; Bronson on Fixtures, Sect. 62; Amos and Ferrard on Fixtures, Third Edition, p. 293; Tyler on Fixtures, pp. 561, *et seq.*

Where the question arises between a mortgagee and a tenant of the mortgagor, there is an irreconcilable conflict of decision as to the tenant's right of removal. Some courts hold that the mortgagor cannot grant to another a greater right than he himself has, and as he cannot, as against the mortgagee, remove fixtures attached to the land even for trade purposes, he cannot, as against the mortgagee, grant such right to his lessee, and the lessee can be restrained from removing chattels after annexation thereof, even though the original value of the mortgage security be not impaired.[5] Other courts have adopted the rule that if the original value of the security for the payment of the mortgage debt is not affected by the removal of the fixture, then the morgtagee has no just ground of complaint against the removal.[6]

In *Merchants' National Bank* v. *Stanton*,[7] Mitchell, J., explains this conflict of decision as follows: "It undoubtedly was formerly the rule that all fixtures annexed subsequent to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became as to the mortgagee, a part of the realty. But this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. . . But in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty,

[5] Ewell on Fixtures, Second Edition, p. 412; Brown, Fixtures, 4th Edition, p. 60; Clary v. Owen, 15 Gray 522 (Mass., 1860); Lynde v. Rowe, 12 Allen 100 (Mass., 1866).

A similar rule has been applied in Massachusetts and some other jurisdictions as between a prior mortgagee and a third person annexing chattels to the premises, as a conditional vendor, licensee, etc.; it would appear to be immaterial whether the right to remove the fixture is asserted before or after foreclosure of the mortgage. See Meagher v. Hayes, 152 Mass. 228 (1890); Tarbell v. Page, 155 Mass. 257 (1892); Wight v. Gray, 73 Maine 297 (1882); Young v. Chandler, 102 Me. 251 (1906).

[6] Bronson, Fixtures, Sect. 70c; Belvin v. Raleigh Paper Company, 123 N. C. 139 (1898); Broaddus v. Smith, 121 Ala. 335 (1898); Ellis v. Glover and Hobson, 1 K. B. 388 (1908). The right of removal in the tenant was sustained even after foreclosure of the mortgage in Pioneer Savings & Loan Co. v. Fuller, 57 Minn. 60 (1894), and Ferris v. Quimby, 41 Mich. 202 (1879), also in Sprague National Bank v. Erie Railroad Co., 48 N. Y. S. 65 (1897), and Bernheimer v. Adams, 75 N. Y. S. 93 (1902); but *cf.* McFadden v. Allen, 134 N. Y. 489 (1892). McFadden v. Allen, though decided by the Court of Appeals of New York, while the later cases in New York are merely Supreme Court decisions, was not a case involving trade fixtures and seems not inconsistent with the later decisions.

The right of a third party to remove as against a prior mortgagee is sustained in Campbell v. Roddy, 44 N. J. Eq. 244 (1888); Binkley v. Forkner, *et al.*, 117 Ind. 176 (1888); Paine v. McDowell and Tucker, 71 Vt. 29 (1898); Oil City Boiler Works v. the Light Company, 81 N. J. L. 491 (1911).

[7] 55 Minn. 211, at p. 220 (1893).

and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on the part of a prior mortgagee will not of itself make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation."

In *Broaddus* v. *Smith*,[8] where, as in the principal case, there was an express agreement between mortgagor and tenant that the latter might remove certain fixtures, the court held that "Where the owner of real estate contracts or agrees with a tenant that the tenant may erect or affix anything on the realty, and that the thing so affixed shall remain the property of the tenant, a prior mortgagee of the real estate acquires no interest in the chattel attached, subject, however, to the limitations that the mortgagor and tenant may not, by their acts, do anything to impair the mortgagee's security."

The particular question involved in our principal case seems not to have arisen before in Delaware. The court distinguishes *Watertown Company* v. *Davis*.[9] In that case, there had been a conditional sale of an engine and boiler to a mortgagor, who made default in payment of the purchase price. The question arose between the purchaser of the premises upon foreclosure and the conditional vendor. It appeared that the equipment had been attached to the soil as a permanent improvement to the property. These circumstances would seem sufficient to warrant the court's concluding in that case that the rights of the mortgagee rose higher than those of the conditional vendor.

On the whole, it would seem that where there is evident a legal intention of both lessor and lessee not to make trade fixtures, or improvements, a part of the land, and as between these persons, the buildings remained chattels, removable during the term, the mortgagee has no equitable ground of complaint when it is not alleged or shown, that the value of the security which he had when the mortgage was made, and on which he relied, is impaired by the annexation and removal of buildings by the tenant during the term and prior to a foreclosure of the mortgage. It may be said therefore that the court, approaching a question new in the jurisdiction, upon which there is considerable conflict of authority, very properly followed the modern tendency in favor of the lessee's right to remove trade fixtures as against the prior mortgagee of the premises.

H. A. L.

---

[8] 121 Ala. 335 (1898).
[9] 5 Houst. 192 (Del., 1877).